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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Fees for Ancillary or Supplementary Use of Digital
Television Spectrum Pursuant to Section 336(e)(1)
of the Telecommunications Act of 1996

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MM Docket No. 97-247

To the Commission:

COMMENTS OF UCC, *et al.*

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	2
I. ANY FEE THE COMMISSION ADOPTS MUST BE BASED, AT LEAST IN PART, ON A PERCENTAGE OF GROSS REVENUES	4
A. <i>Fee based on auction revenues</i>	4
B. <i>Fee Based on Net Revenues or Incremental Profits</i>	5
C. <i>Fee Based on Gross Revenues/Hybrid Fee</i>	7
II. THE FEE FOR ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE NO LESS THAN 10% OF GROSS RECEIPTS	8
III. THE COMMISSION SHOULD REQUIRE ANNUAL FEE PAYMENTS AND SUBMISSION OF AN AUDIT, AND SHOULD ENGAGE IN RANDOM INDEPENDENT AUDITS TO ENSURE COMPLIANCE	10
A. <i>Fees Should Be Paid Annually</i>	10
B. <i>The Commission Should Require Broadcasters to File Annual Audits, and Should Conduct Random Independent Audits</i>	11
IV. FEES SHOULD BE IMPOSED ON HOME SHOPPING, INFOMERCIAL, DIRECT MARKETING AND OTHER SERVICES FOR WHICH A PER-TRANSACTION OR OTHER FEE IS PAID AND ON REVENUES BROADCASTERS RECEIVE IN EXCHANGE FOR "RETRANSMISSION CONSENT"	12
A. <i>Home Shopping/Infomercial Programming/Direct Marketing</i>	13
B. <i>Retransmission Consent Fees</i>	14
V. PUBLIC BROADCASTERS' ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE EXEMPT FROM FEES ONLY IF THOSE SERVICES ARE NOT ADVERTISER-SUPPORTED	15
VI. THE COMMISSION SHOULD MAKE A RECOMMENDATION TO CONGRESS TO AMEND THE COMMUNICATIONS ACT TO PERMIT FEES COLLECTED UNDER SECTION 336 TO BE PLACED IN A FUND TO SUPPORT PUBLIC BROADCASTING AND OTHER NONCOMMERCIAL TELECOMMUNICATIONS SERVICES	17
CONCLUSION	18

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The Office of Communication of the United Church of Christ, the Benton Foundation, the Center for Media Education, the Civil Rights Forum and the Media Access Project ("UCC, *et al.*") respectfully submit these comments to the *Notice of Proposed Rulemaking*, FCC No. 97-414 ("*NOPR*") in the above docket. The *NOPR* seeks comment on how the Commission should assess and collect fees for ancillary and supplementary services provided by digital TV broadcasters pursuant to Section 336(e) of the Telecommunications Act of 1996 ("1996 Act").

Congress expressly instructed the FCC develop a fee structure which ensures that:

- the public receives a portion of the value of the spectrum given to broadcasters;
- broadcasters are not unjustly enriched by the use of free spectrum for pay services;
- the value recovered approximates that which would have been realized had the spectrum been auctioned.

To achieve these goals, Commission should:

- impose an annual fee of no less than 10% of a broadcaster's gross receipts from ancillary and supplementary services, to be adjusted, if necessary, in the future;
- require broadcasters engaging in ancillary and supplementary services to file an annual audit, and conduct random independent audits;
- define home shopping, infomercial programming, direct marketing and retransmission consent compensation as "feeable" ancillary and supplementary services;
- exempt public TV broadcasters' ancillary and supplementary services from fees, but only if they do not provide advertiser-supported services;
- recommend that Congress use these fees to help fund public broadcasters, noncommercial programming and other noncommercial telecommunications services.

INTRODUCTION AND SUMMARY

The Commission's proposal gives inadequate weight to the Congressional directive that the public be adequately compensated when spectrum is used for subscription (*i.e.*, pay) services.

As part of the 1996 Act, Congress gave incumbent broadcast licensees the exclusive right to extra spectrum, free of charge, to convert to digital television transmission. It also permitted new revenue-enhancing "ancillary and supplementary" services. To help compensate the public for broadcasters' use of publicly-owned spectrum to provide multiple subscription (as opposed to free) services, broadcasters must pay fees for such uses. 47 USC §336(e). The Commission is mandated to design fees

(i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment....

47 USC §336(e)(2)(A). Congress also required that the fees

recover for the public an amount that, to the extent feasible, equals, but does not exceed...the amount that would have been recovered had such services...[been auctioned] pursuant to the provisions of Section 309(j).

47 USC §336(e)(2)(B).

From this language, it is clear that Congress' primary goal was to ensure that broadcasters adequately recompense the public when spectrum given free to broadcasters is used for pay services. By contrast, nothing in the plain language or legislative history of the 1996 Act manifests any Congressional intent to incentivize broadcasters to provide these services. Yet throughout the NOPR, the Commission incorrectly treats its desire to provide incentives to broadcasters as something to be balanced against Congress' specifically expressed goals. *E.g.*, *NOPR* at ¶11.

There is neither a mandate nor a need for the Commission to provide incentives to

broadcasters to provide these services. The marketplace will surely provide that incentive. As respected media consultant Gary Arlen states in a recent white paper, which is attached to these comments:

The size of this opportunity is immense. A fully implemented DTV initiative could generate 30% to 50% in additional revenues for broadcasters from multicast video and data transmission. It may be too early to forecast precise revenue levels from these new streams, but the variety and diversity of DTV technology is creating new opportunities in high value-added sectors, such as business video and data transmission.

"Making the Transition: A New Kind of Television (Rethinking Broadcast TV for the Digital Age)" at 2 ("Arlen Report").

Faithful to the legal duties outlined in the 1996 Act requires the Commission to follow Congress' mandate and ensure that the public is compensated for the use of the spectrum. To do so, the Commission must adopt a fee that guarantees significant income. Of the fees it has proposed, only those which include a percentage of gross revenues can meet that goal. The other proposed fee structures are either subject to manipulation by clever accountants, or contain no guarantee that they will return much, if anything, to the public. Broadcasters should pay these fees annually, supported by a signed audit detailing the gross revenues for each service.

The Commission must also ensure that all services for which a broadcaster receives compensation, other than from commercial advertisements, are subject to the fee it adopts. These services must include home shopping, infomercial, direct marketing and other services for which a broadcaster receives a per-transaction fee. Moreover, any compensation (cash or in-kind) a broadcaster receives from a cable operator for carriage of its digital TV signals should be considered "feeable."

Finally, the Commission should exempt public TV stations from paying ancillary and sup-

plementary service fees, but only on the condition that those stations do not carry advertiser-supported programming. It should also urge Congress to amend Section 336(e) to permit the fees to be paid into a fund that will support public broadcasting, noncommercial programming and other noncommercial telecommunications services.

I. ANY FEE THE COMMISSION ADOPTS MUST BE BASED, AT LEAST IN PART, ON A PERCENTAGE OF GROSS REVENUES.

The Commission proposes several fees for the purpose of meeting the Congressional mandate that the agency "recover for the public a portion of the value of the public spectrum" that approximates the revenues it might have received had the spectrum been auctioned to the highest bidder. 47 USC §336(e)(2)(B). To reduce any burden on the agency and broadcasters, the Commission seeks a fee structure that is "simple to understand and...calculable with readily available information." *NOPR* at ¶9.

Specifically, the Commission proposes four fees: 1) a fee based on the amount that would have been received in a spectrum auction; 2) a fee based on net revenues or incremental profits from the ancillary and supplementary services; 3) a fee on a percentage of the gross revenues for the ancillary and supplementary uses of this capacity; and 4) a fee based upon a hybrid of a flat rate and a percentage of gross revenues. *NOPR* at ¶12. For the reasons discussed herein, UCC, *et al.* believe that the only fee that will meet both Congress' and the Commission's goals is one that includes a percentage of gross revenues from ancillary and supplementary services.

A. Fee Based on Auction Revenues

The Commission seeks comment on how it can design a fee program to meet Section 336(e)(2)(B)'s mandate that the Commission "recover for the public an amount that, to the extent feasible, equals but does not exceed...the amount that would have been recovered had such ser-

vices been licensed pursuant to the provisions of Section 309(j) of [the Communications] Act." *NOPR* at ¶15. It concludes that it should not adopt such a fee because, *inter alia*, it would be difficult if not impossible to value the spectrum appropriately. *Id.*

UCC, *et al.* agree with the Commission that such a fee is not "feasible." Because broadcast spectrum has been exempt from competitive bidding, the Commission cannot place an accurate market value on the spectrum. The many billions of dollars raised in auctions for personal communications services provide little guidance as to the spectrum's value not only because, as the Commission states, the auctions "took place in circumstances so different," *id.*, but also because broadcast spectrum has always been considered the most valuable of all the airwaves. Moreover, as the Commission notes, even if it could place a value on the spectrum, it would be extremely burdensome, if not impossible, to calculate out how much of the spectrum's capacity is being used for feeable services during a defined period, and then prorate the value of the spectrum based on that usage. *Id.*

B. Fee Based on Net Revenues or Incremental Profits

The Commission proposes a fee based either on the net revenue (revenue minus incremental costs and a portion of joint and common costs) from ancillary and supplementary services, or on the incremental profits (gross revenue of service minus incremental costs associated with service). While the Commission notes that such fees would have the benefit of permitting broadcasters to build their ancillary and supplementary services to a break-even point before assessing a fee, it expresses concern that the difficulty in allocating certain costs under these fee models would lead to "accounting and enforcement difficulties." *NOPR* at 22-23.

This vastly understates the nature of the difficulties inherent in these fee models. Both

are susceptible to creative accounting that could ensure that broadcasters pay few if any fees. For example, in the net revenue model, a broadcaster deducts a portion of its "joint and common costs" from its gross revenues. These costs could include almost anything a broadcaster can attribute to the ancillary and supplementary service, regardless of whether that cost would have been incurred in any event (*e.g.*, labor, equipment, facilities). Most importantly, it would be nearly impossible for the Commission to determine whether a broadcaster has properly apportioned the joint and common costs among its free and subscription services.¹ Thus, it would be quite simple to make those figures so large as to wipe out most or all of a broadcaster's fee liability.

In addition, in both fee models, "incremental costs" are deducted to determine the total fee liability. Again, determining what constitutes a service-specific "incremental cost" is subject to manipulation, and in any event, will be nearly impossible for the Commission to define. If the Commission were to adopt either of these models, it would necessarily have to adopt specific cost-accounting rules "to insure consistent and uniform calculations of incremental cost" and also require detailed recordkeeping on the part of broadcasters to ensure compliance. *NOPR* at ¶23. Because these models are unlikely to meet Congress' express requirement that the public be compensated for the use of the spectrum, there is little reason to burden the agency or broadcasters

¹The Commission has struggled with properly assigning joint and common costs for common carriers for many years. See, *e.g.*, *Jurisdictional Separations Reform and Referral to the Joint Board*, FCC 97-354 (released Oct 7, 1997); *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, 2 FCC Rcd 1298 (1987).

with the accounting and recordkeeping burdens that would be a necessary corollary to these models.²

C. Fee Based on Gross Revenues/Hybrid Fee

The Commission proposes two fees that are based on a percentage of gross revenues from ancillary and supplementary services. *NOPR* at ¶24. The first is a fee based solely on a percentage of gross revenues. The second is a hybrid of a flat fee and percentage of gross revenues. Presumably, the percentage applied to the hybrid fee would be less than that applied to the straight gross revenue fee, because the former is coupled with a flat fee. *NOPR* at ¶27.

UCC, *et al.* believe that any fee that includes a percentage of gross revenues is the most likely to 1) recover a portion of the spectrum for the public and 2) not unjustly enrich broadcasters. They agree with the Commission that such a fee would be far more simple to calculate and collect. *See NOPR* at ¶24. More importantly, such a fee is less susceptible to manipulation than the net revenue and incremental cost models.

Both the hybrid and the straight percentage assessment have benefits and downsides. The flat fee portion of the hybrid fee would absolutely guarantee that the public recovers some portion of the value of the spectrum. The basis upon which to calculate the flat fee, however, is unclear. *See* discussion at I.A, above.³ The straight gross revenues fee is simpler to calculate, and can

²To accurately ensure appropriate assignment of costs, the Commission might be forced to impose rules as complex as the Uniform System of Accounts in part 32 of the Commission's rules. *See* 47 CFR Part 32.

³To the extent that the Commission believes that fees are an "up-front" cost that may serve as a disincentive for some broadcasters to provide ancillary and supplementary services, *NOPR* at ¶25, this is a secondary consideration to Congress' expressed intent that a fee be imposed to compensate the public for the use of its spectrum for other than free over-the-air services.

be readily verifiable by the submission of an audit signed by a certified public accountant. But if gross revenues for these services are low, the Commission will not nearly approach the goals of "recovering for the public an amount...that equals" the amount that would have been realized in an auction and avoiding "unjust enrichment" of broadcasters.

Because the Commission has little upon which to base a flat fee, and because the fees must "be adjusted by the Commission from time to time...", 47 USC §336(e)(2)(C), the best solution may be for the agency to impose a straight gross receipts fee for a finite period of years (*e.g.*, three years after ancillary and supplementary services start to be offered to the public) and then commit to review whether a flat fee is necessary or desirable thereafter.

II. THE FEE FOR ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE NO LESS THAN 10% OF GROSS RECEIPTS.

The Commission seeks comment on the proper percentage rate to be applied to a fee based on revenues. *NOPR* at ¶26. It asks commenters to take into account the "statutory requirements that the fee recover a portion of the value of the spectrum used for these services, avoid unjust enrichment, and approximate the revenue that would have been achieved had these services been licensed through auction." *Id.* It also asks whether the Commission should adjust the percentage depending on the type of service a broadcaster provides, or the time of day the service is provided. *Id.* at ¶¶28-29.

As discussed above, the only type of fee that is capable of ensuring that these goals are met is one based on a percentage of gross revenues. For such a fee, the Commission suggests a percentage of between one and ten percent of gross revenues. *NOPR* at ¶27.

Based upon the fees that other private sector parties pay to the government for the right to use public property, UCC, *et al.* urge the Commission to set a fee of no less than 10% of

gross revenues.⁴ Anything less would result in unjust enrichment for broadcasters. Ten percent would be less than the 12.5% to nearly 17% of gross revenues that mining and oil companies pay the government for onshore and offshore mineral leases on federal public lands. Telephone interview with Michael Baugher, Bureau of Land Management, Department of the Interior. It would also be on par with the 9% gross revenue fee that concessionaires pay certain federal agencies (such as NASA and the Department of Veterans Affairs) for the right to operate concessions on federal lands. See GAO Testimony before the House of Representatives Subcommittee on National Parks, Forests, and Lands, Committee on Resources, "Federal Lands: Concession Reform is Needed," GAO/T-RCED/GGD-96-223 (July 18, 1996) at 2-3.⁵ In any event, if the 10% fee does not meet Congress' goals, the Commission can adjust this percentage in the future. See 47 USC §336(e)(2)(C).

Moreover, the percentage rate should not vary based upon the type of service or the time of day. First, and foremost, a straightforward, across the board fee will be far less burdensome for broadcasters and the agency. Figuring out how the Commission could use a varying per-

⁴The federal government routinely collects fees from members of the private sector when they profit from using public resources. However, they are not always based on gross revenues. For example, the U.S. Forest Service, after setting a minimum bid amount based on an appraisal of the resources available, sells the right to log timber on federal land using competitive bidding. Telephone interview with Rod Lee, Office of the Director of Timber Management, U.S. Forest Service. The National Park Service collects fees from concessionaires that sell food and other items in national parks. See National Park Service Website, found at <http://www.nps.gov/concessions/program.html>. And ranchers pay \$1.35 per "animal unit" each month to have their live-stock graze on public lands. Kara Altenbaumer, "Grazing rules face change," *Las Vegas Review Journal*, October 31 1997.

⁵While a 10% fee would be higher than the 5% of gross revenues that cable operators pay municipalities for the right to use local rights of way to lay cable, the right to share local rights of way is far less valuable than the exclusive right to use federal property.

centage rate fee "to adjust the costs to broadcasters of providing feeable ancillary or supplementary services to reflect the different costs to competitors offering analogous services," *NOPR* at ¶28, would be an extremely difficult task and a huge waste of Commission resources. Second, to the extent that lower fees for one type of service might provide incentives for broadcasters to provide that service over another with higher fees, *id.*, the Commission should not put itself in the position of picking winners and losers in the marketplace by varying fees to favor one service over another.

III. THE COMMISSION SHOULD REQUIRE ANNUAL FEE PAYMENTS AND SUBMISSION OF AN AUDIT, AND SHOULD ENGAGE IN RANDOM INDEPENDENT AUDITS TO ENSURE COMPLIANCE.

The Commission seeks comment on how it should implement and collect the fees required under Section 336(e). *NOPR* at ¶32. It also asks for comment on how it might ensure accurate revenue information should it adopt a fee that is based on revenues. *Id.* at ¶33.

To meet Congress' goals, the Commission should require that fees be paid annually, and that broadcasters file an audit each year with detailed statements of revenues from each service. To ensure broadcaster compliance and accountability, the Commission should conduct independent, random audits of broadcasters' revenues.

A. Fees Should Be Paid Annually

To ensure consistent and reliable payment of fees, the Commission should require broadcasters to pay fees no less often than annually. The statute instructs that

the Commission...establish a program to assess and collect from the licensee...an annual fee or other schedule or method of payment *that promotes the objectives described in [Sections 336(e)(2)(A) & (B)]*.

Permitting licensees to pay once every eight years at license renewal time could jeopardize Congress' goals of compensating the public and avoiding broadcasters' unjust enrichment. Paying eight years worth of fees at once would not only be burdensome for some licensees, the long period between payments also increases the possibility that money that would have been paid on an annual basis will have been spent, and will no longer be available. Presumably, if a broadcaster sells its station(s) before license renewal, it could get away without paying anything. Finally, permitting broadcasters to use and earn interest for eight years on money that rightly belongs to the public would certainly qualify as "unjust enrichment."

B. The Commission Should Require Broadcasters to File Annual Audits, and Should Conduct Random Independent Audits.

Should the Commission adopt a fee structure based on revenues, it must ensure that they are accurate and verifiable. Otherwise, the fee will be rendered meaningless.

To ensure accuracy and accountability, the Commission should require broadcasters to file their annual audits with the Commission. These audits must be signed by a certified public accountant and contain detailed statements of revenues for both free and ancillary or supplementary services. Since broadcasters must have such audits completed in any event, it is hardly burdensome to place them on file with the Commission.

In addition, the FCC should conduct random independent random audits of broadcasters to ensure that they are accurately reporting gross revenues from ancillary and supplementary services. As part of its recent proposal to significantly streamline its application forms and processing procedures, the Commission has similarly proposed to conduct random audits of broadcasters to ensure compliance with the new rules. *Notice of Proposed Rulemaking*, FCC No. 98-57 (released April 3, 1998). Random audits will put broadcasters on notice that the

Commission will hold them accountable for the accuracy of the information they provide.

IV. FEES SHOULD BE IMPOSED ON HOME SHOPPING, INFOMERCIAL, DIRECT MARKETING AND OTHER SERVICES FOR WHICH A PER-TRANSACTION OR OTHER FEE IS PAID AND ON COMPENSATION BROADCASTERS RECEIVE IN EXCHANGE FOR "RETRANSMISSION CONSENT."

Congress directed the FCC to impose fees on ancillary and supplementary services:

(A) For which the payment of a subscription fee is required in order to received such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),...

47 USC §336(e)(1).

In the conference report, Congress clarified that fees should be imposed "if subscription fees or *any other compensation* apart from commercial advertisements are required in order to receive such services." H.R. Conf. Rep. No. 458, 104th Cong, 2nd Sess. 160 (1996) [Emphasis added.] As the Commission recognizes, this is a broad definition that requires fee assessment on "any ancillary and supplementary services that are not supported entirely by commercial advertisements." *NOPR* at ¶8.

Under this definition, home shopping, infomercial, direct marketing and other services for which broadcasters receive a per-transaction fee or other similar compensation are "feeable" ancillary and supplementary services. In addition, any fees that broadcasters receive from cable operators in exchange for cable carriage are also compensation subject to whatever fee structure the Commission creates.⁶

⁶The Commission should consider treating the value of time afforded without charge to candidates for public office as an offset against revenues. Section 336(e)(2)(A) directs the

A. *Home Shopping/Infomercial Programming/Direct Marketing*

Typically, a broadcaster transmits home shopping programming in exchange for payment of a per-transaction fee by the vendor.⁷ With respect to infomercial programming, there may be any number of arrangements by which a broadcaster receives payment. In some cases, the infomercial provider pays the broadcaster to air programming. In others, the infomercial provider agrees to share the proceeds from sales with the broadcaster, or the broadcaster may receive a "per-inquiry" fee from the infomercial provider. In all of these cases, the compensation received by the broadcaster clearly falls under the plain language of Section 336(e), which requires the Commission to impose fees when a licensee "directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party...." 47 USC §336(e)(1)(B).

For the same reasons, direct marketing and other similar arrangements by which broadcasters obtain a per-transaction fee for sales are also feeable ancillary and supplementary services. Some of these transactions may accompany free digital and high definition television programming.⁸ For example, a viewer watching her favorite football team might click on a special icon

Commission "to recover for the public a portion of the value of the public spectrum resource made available for such commercial use,..." It does not specify that the "value" must be received entirely in cash. Section 336(e)(3)(A) uses the term "proceeds" in directing that amounts received be directed to the general treasury. There is no indication of any Congressional intent that the "value" received by the public must be coextensive with the "proceeds" deposited. Rather, it is entirely reasonable to construe the term "proceeds" as referring only to cash generated from fees.

⁷In the case of programming provided by various home shopping programming networks, the network itself is the vendor that pays the broadcaster.

⁸That some transactions take place during the broadcast of a free service is of no import. The Commission recognizes that "feeable ancillary and supplementary services may be offered simultaneously with other services." *NOPR* at ¶8.

that provides her with an instant opportunity to buy the team jersey for \$34.95, two dollars of which goes to the broadcaster. Under Section 336, this "compensation" to the broadcasters is also "feeable."⁹

B. Retransmission Consent Fees and In-Kind Compensation

The battles over digital "must carry" have been well documented. Broadcasters are seeking to extend the current right to cable carriage for their analog signals to their future digital signal. "Cable Warns of Likely Public Reaction to DTV Must-Carry," *Communications Daily*, April 23, 1998 at 2. Cable operators, on the other hand, argue that they have neither the legal duty, nor the capacity, to carry both the analog and digital signals. *Id.*

What has also been reported is that some, mostly larger, broadcasters are in serious negotiations with cable operators to ensure carriage of their digital signals. Paige Albinak, "No Must, no fuss," *Broadcasting & Cable*, April 27, 1998 at 4. It is possible, and perhaps even likely, that cable operators will pay these broadcasters a per-subscriber fee and/or other

⁹Gary Arlen describes the revenue opportunities presented by digital shopping services:

Shopping is a good example of a migration path from simply airing commercials into profiting from the transactions and product sales****

The lessons of Direct Marketing have formed the basis of much of the e-commerce on the World Wide Web. And in turn, those experiences can be transferred to the bigger bandwidth of Digital TV - creating a challenging new line of business in which broadcasters can get a "piece of the action" on transactions conducted via their bandwidth****

These huge new interactive sales industries - generating \$1 billion in sales in 1997, expected to quintuple by 2002 - hint at the opportunity awaiting broadcasters. Creative alliances and participation in broadband merchandising represent entirely new business opportunities.

compensation for the right to carry their signals, *i.e.*, pay them for retransmission consent."¹⁰

In other cases, broadcasters may exchange barter or in-kind benefits, such as subscriber demographic data or other information, for cable carriage and a share of cable operators' revenues. In the latter scenario, carriage of the digital signal is part of the compensation that is subject to fees.

In both of these cases, "other compensation apart from commercial advertisements [is] required to receive" the digital TV signal. Thus, the Commission must apply its fee structure both to cash payments a broadcaster receives for cable carriage, but also to the value of any other benefits (*e.g.*, cable carriage) a broadcaster receives as a part of a barter agreement with cable operators.

V. PUBLIC BROADCASTERS' ANCILLARY AND SUPPLEMENTARY SERVICES SHOULD BE EXEMPT FROM FEES ONLY IF THOSE SERVICES ARE NOT ADVERTISER-SUPPORTED.

The Commission notes that public television licensees have requested that they be relieved from any obligation to pay fees when they offer feeable ancillary and supplementary services. *NOPR* at ¶30. The licensees seek the exemption to help fund their noncommercial programming.

UCC, et al. generally support this exemption. The additional capacity provided by digital transmission will allow public television licensees to supplement their meager government funding with extra revenues that will be used to provide more and better noncommercial programming

¹⁰Since the inception of retransmission consent in the 1992 Cable Act, most broadcasters have been unable to extract cash for retransmission consent. In the digital world, however, broadcasters will have more leverage. For the short term, cable operators wishing to sell subscribers access to their "digital tiers" will be without programming that would entice them to pay extra for this service. The addition of digital broadcast programming could provide an incentive for cable viewers to subscribe to the digital tier. For this reason, cable operators will likely be willing to pay digital broadcasters for their digital signals.

to the public. As discussed below, the Commission should also recommend that Congress amend the 1996 Act to permit the fees from ancillary and supplementary services to be placed in a fund to support public broadcasters and other noncommercial telecommunications services.

UCC, *et al.* believe that the Commission could reasonably interpret Section 336(e) to exempt public broadcasters from fees, as the plain language of the statute is somewhat ambiguous as to whether such fees apply to noncommercial broadcasters. The FCC, however, should not exempt public TV licensees from fees if they also provide ancillary and supplementary services that are advertiser-supported. In their Petition for Reconsideration and Clarification of the *DTV Fifth Report and Order*, 12 FCC Rcd 12806 (1997), APTS and PBS have asked the Commission to clarify that public broadcasters should be permitted to provide ancillary and supplementary services under Section 336, including those that are advertiser-supported. APTS/PBS Petition at 26-28. They argue that since the plain language Section 336 does not differentiate between commercial and noncommercial TV licensees in permitting the provision of ancillary and supplementary services, noncommercial TV stations should be permitted to provide equivalent ancillary and supplementary services, including advertiser-supported services. *Id.* at 26-27; July 31, 1997 APTS/PBS Reply Comments in MM Docket No. 87-268 at 4-6.

APTS and PBS cannot have their cake and eat it too. Notwithstanding the fact that Section 399B of the Communications Act prohibits noncommercial licensees from broadcasting advertisements, the public broadcasters cannot, under any plausible reading of Section 336, be permitted to provide advertiser-supported ancillary and supplementary services *and* also be exempt from fees for those services. Just as Section 336 makes no distinction between broadcasters with respect to their ability to provide advertiser-supported ancillary and supplementary services, it also

makes no distinction as to which broadcasters must pay fees. Either public television is a non-commercial service entitled to special benefits because of its noncommercial nature, or it is a commercial service that should be treated like other such services.

VI. THE COMMISSION SHOULD MAKE A RECOMMENDATION TO CONGRESS TO AMEND THE COMMUNICATIONS ACT TO PERMIT FEES COLLECTED UNDER SECTION 336 TO BE PLACED IN A FUND TO SUPPORT PUBLIC BROADCASTING AND OTHER NONCOMMERCIAL TELECOMMUNICATIONS SERVICES.

As discussed above, public broadcasting, noncommercial programming and other noncommercial telecommunications services are, and will continue to be, seriously underfunded. Indeed, before accounting for inflation, funding for the Corporation for Public Broadcasting in 1998 is actually 12% *less* than it was in 1995 (\$285 million versus \$250 million). As public broadcasters convert to digital technology, their need for new revenue streams will only increase.

The fees generated by ancillary and supplementary services present a great opportunity for Congress to help ease public broadcasting's transition to digital transmission and to provide it a long-term supplemental funding source.¹¹ The 1996 Act, however, currently requires that the fees collected for ancillary and supplementary services be placed in the United States Treasury. 47 USC §336(e)(3). Congress must amend Section 336 if public broadcasting and other non-commercial telecommunications services are to receive fee revenues.

While the FCC is powerless to direct the fees other than to the Treasury, it may make recommendations to Congress to do so. *See, e.g., Fairness Report*, 102 FCC 2d 143, 247

¹¹UCC *et al.* recognize, however, that these fees alone are unlikely to resolve many of the funding problems of noncommercial telecommunications entities. It is possible that these fees may not generate much income because it is uncertain 1) how many broadcasters will actually engage in ancillary and supplementary services, and 2) whether the fee rate the FCC sets in this docket will generate significant income.

(1985)(recommending that Congress repeal the fairness doctrine).¹² The Commission should therefore recommend that Congress amend Section 336(e)(3) of the 1996 Act to direct the agency to place these fees in a special fund for noncommercial telecommunications entities, as defined in 47 USC §397(7), noncommercial programming and public broadcasters.

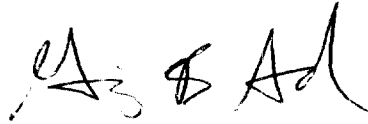
CONCLUSION

The Commission must heed the will of Congress and set fees for digital ancillary and supplementary services that adequately compensate the public. Whether those fees also provide incentives for broadcasters is a secondary consideration for the Commission, at best. A minimum 10% gross receipts fee on pay services, including home shopping, infomercials, retransmission consent compensation and other revenue generating services other than advertisements would be a first good step in ensuring that Congress' mandate is satisfied. If these fees can then be channelled to noncommercial telecommunications services and programming then the public bene-

¹²Indeed, it is likely that the Advisory Committee on Public Interest Obligations ("Gore Commission") will make a recommendation to Congress that such fees be placed in an endowment for public broadcasting and other noncommercial telecommunications entities. *See generally*, Afternoon transcript of April 14 meeting of the Advisory Committee on Public Interest Obligations of Digital TV Broadcasters. *See* Website of the Advisory Committee on Public Interest Obligations of Digital TV Broadcasters, found at www.ntia.doc.gov/pubintadvcom/aprmtg/transcript-pm.htm.

fits will be even greater.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gigi B. Sohn'.

Gigi B. Sohn

A handwritten signature in black ink, appearing to read 'Cheryl A. Leanza'.

Cheryl A. Leanza

A handwritten signature in black ink, appearing to read 'Andrew Jay Schwartzman'.

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May 4, 1998

ATTACHMENT

MAKING THE TRANSITION: A NEW KIND OF TELEVISION
Re-thinking Broadcast TV for the Digital Age

A White Paper

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April 1998

Contents

Executive Summary	2
Background	3
A Few Definitions	5
Introduction	6
A New Kind of Television	6
Facing New Decisions	6
The Right Place to Begin a Migration	7
Developing a New Business Model	7
Timetable Favors HD0	8
Lack of Interest in HDTV at Local Level	8
What Do Audiences Want?	9
Viewers Are Already Multitasking	10
The Price Barrier	10
Beyond Technology	11
The Issue Is Open	11
Progressive Is Inevitable	12
Down-Converting Allows Station Evolution	12
What Kind of Programs?	13
Linear News and Entertainment Survive	13
Program Possibilities	13
Putting the Opportunities in Perspective	14-17
Financial Factors	18
Investment Considerations	18
Production	18
Storage and Hosting	19
Down-conversion	19
The Business Model	20
Establishing New Revenue Sources	20
The Shopping Option	20
Conclusion	21
About the Author	23
Resources	23

Factoid David Sarnoff used the term "high definition" to describe a prototype 343-line TV system developed in the 1930s; it was, after all, higher resolution than the 40-line mechanical systems of that time.

EXECUTIVE SUMMARY

The introduction of Digital Television, a new broadcast television platform, opens many doors for broadcasters:

- innovative programming
- additional revenue sources
- enhanced competitive positioning.

The size of this opportunity is immense. A fully implemented DTV initiative could generate 30% to 50% in additional revenues for broadcasters from multicast video and data transmission. It may be too early to forecast precise revenue levels from these new streams, but the variety and diversity of DTV technology is creating new opportunities in high value-added sectors, such as business video and data transmission.

While the incremental revenue factor will vary by market size and characteristics, the underlying opportunity exists in every broadcast environment.

Goal of this paper: Digital TV represents totally new types of business opportunities for broadcasters. This paper seeks to define these new revenue-producing prospects, while helping broadcast professionals develop a DTV transition plan. In the process, the following material identifies applications that broadcasters can evaluate as they choose the correct format for DTV transmission. (Note: This report deals only with U.S. implications of Digital Television, although many of the same issues are being debated elsewhere in the world.)

HDTV/SDTV Trade-off: As broadcasters make their DTV decisions, it is important to establish an iterative entry plan. Numerous research studies affirm that the mass market will not be ready for High Definition TV (HDTV) for several more years; barriers such as high receiver prices and equipment distribution along with paucity of programming will hold back wide penetration of HDTV during the coming years. Hence, a strategy that begins with Standard Definition Television (SDTV) and datacasting services allows broadcasters to make reasonable investments and generate revenues more quickly, while preparing to add HDTV as the market warrants.